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No. 03-47

In the Supreme Court of the United States

FRANK D. GILLIS, ET AL.,
Petitioners

v.

JOHN HOLLAWELL, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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In light of respondents' mootness argument, *see* Br. in Opp. 10-11, we first address the developments in each case since we filed our petition.

CURRENT POSTURE OF THESE CASES

Mickens-Thomas v. Vaughn.

When we filed the petition for certiorari, the Court of Appeals had ordered the Board to give Mickens-Thomas a new hearing on his parole application within 45 days, applying the pre-1996 standards announced by the Court of Appeals. *See* Pet. App. 59a-60a. The Court of Appeals refused to stay its order pending a decision on this petition; accordingly, the Board issued a new decision on May 23, 2003, again denying parole.

Mickens-Thomas, claiming that the Board had not properly complied with the Court of Appeals' order, asked the Court of Appeals to order his immediate release. On June 18, 2003, the Court of Appeals denied that motion on the ground that it should have been made to the District Court. Mickens-Thomas then asked for the same relief in the District Court, which the District Court denied on August 22, 2003,[1] holding that "the Board did give [Mickens-Thomas] a fair hearing in light of ... the considerations in the Third Circuit opinion." Reply App. 10a. On September 9, 2003, Mickens-Thomas appealed that order to the Court of Appeals.

Hollawell v. Gillis.

The Board has not yet re-adjudicated Hollawell's parole application. The Court of Appeals ordered a new

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[1]The District Court's decision is reprinted in the appendix to this brief ("Reply App.") at 1a.

hearing for Hollawell "applying the pre-1996 statute and corresponding rules," Pet. App. 16a, but did not specify any time limit within which the Board had to act. On July 8, 2003, the District Court ordered the Board to re-adjudicate Hollawell's parole application within 90 days. The 90th day turned out to be October 6, 2003 — the opening day of the Court's new Term, and the earliest time at which the Court's disposition of our petition might be announced. In light of this, at the Board's request, the District Court extended its deadline by 30 days, to November 5, 2003.

ARGUMENT

I. The Court of Appeals' Erroneous Elevation of Internal Board Policies to Laws Is Central to Its Decisions And to Their Destructive Effects.

Respondents' primary argument against review is that the first question presented by the petition — whether the Parole Board's internal policies are "laws" for ex post facto purposes — "is simply not presented by these cases," Br. in Opp. 4, because they were "decided below on the basis of a change in the statutory law on parole." Br. in Opp. 5. This characterization, however, tells only half the story of what the Court of Appeals did. The real mischief of the Court of Appeals' decisions — the reason why these decisions are of such concern to Pennsylvania, and why they merit the Court's attention — lies precisely in their treatment of the Board's internal policies.

As we explained in our petition, before the 1996 amendment to the parole statute, Pennsylvania law conferred on the Parole Board virtually unreviewable discretion to grant or deny parole. Pet. at 3-4. If the Court of Appeals had *merely* held that the 1996 amendment changed this scheme by imposing "a more onerous standard for parole," Br. in Opp. 5, its decision would still

have been wrong — as the Pennsylvania Supreme Court held, "both versions of [the statute] leave the decision regarding the grant of parole within the discretion of the Board"[2] — but it would have had little practical impact. Such a decision would simply have restored to the Board the full measure of discretion which the Court of Appeals (erroneously) thought had been removed by the 1996 amendment. The Court of Appeals, however, did far more than this.

The Court of Appeals not only misunderstood the impact of the 1996 amendment, but seriously misconceived the nature of the parole scheme which existed before that amendment. The Court of Appeals disregarded the actual provisions of Pennsylvania's *statutory* scheme — entrusting the Board with broad discretion to grant or deny parole — in favor of its own vision of a Board whose discretion was tightly constrained by a variety of "parameters," which the Court of Appeals in turn cobbled together out of various *administrative* materials. *See* Pet. 12-13, *citing* Pet. App. 29a-32a, 44a-47a. The Court of Appeals did not consider these materials, as respondents would have it, "only as a matter of context," Br. in Opp. 5; rather, the Court of Appeals explicitly held that the Board's internal policies and practices constitute "discernible parameters that *govern its discretion*," Pet. App. 46a (emphasis added), and which cannot be changed without implicating the Ex Post Facto Clause.[3] Pet. App. 47a.

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[2] *Winklespecht v. Pa. Bd. of Probation and Parole*, 571 Pa. 685, 813 A.2d 688, 692 (2002).

[3] The fact that the changes perceived by the Court of Appeals were effected by a statute, as opposed to some administrative action by the Board itself, is thus mere happenstance. Indeed, one district court has already held that

(continued...)

This point is integral, not just to the Court of Appeals' analysis, but also to its judgments. In both *Mickens-Thomas* and *Hollawell*, the Court of Appeals expressly ordered the Board, not just to give Mickens-Thomas a new hearing, but also to apply the pre-1996 policies which the Court of Appeals had just elevated into binding rules.[4] Pet. App. 16a, 59a. In short, the Court of Appeals did indeed hold that the Board's internal policies constituted laws for ex post facto purposes, and ordered relief accordingly.

As we discussed in the petition, the Court of Appeals' treatment of the Board's internal policies directly conflicts with the treatment of similar issues by numerous other federal and state appellate courts, *see* Pet. 19-23, a point which respondents do not even address.

Further, this aspect of the Court of Appeals' decisions works a major distortion of the parole scheme established by Pennsylvania's legislature. The imposition of the detailed "parameters" announced by the Court of Appeals deprives the Board of the broad discretion entrusted to it by the legislature, and subjects the Board's decisions — intended by the legislature to be unreviewable even by

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[3](...continued)
Mickens-Thomas requires the same result whether the Board's internal policies were changed by statute, or by the Board's own action. *See Moore v. Ward*, Civil Action No. 00-0090 (July 10, 2003), *reprinted at* Reply App. 58a (invalidating a parole decision made *before* the statute had been amended).

[4]Indeed, the Board's alleged failure properly to apply these policies in his re-hearing is the basis on which Mickens-Thomas is now seeking release by the courts below. The suggestion that the treatment of the Board's internal policies plays no real role in these cases thus borders on the disingenuous.

the state courts — to extensive second-guessing by the federal courts, as illustrated by *Mickens-Thomas* itself. *See* Pet. App. 49a-54a. Further, these "parameters" are themselves unpredictable, since there is no knowing what stray statement — from a report to the legislature, perhaps, *see* Pet. App. 30a, or from an interview with the press, *see* Pet. App. 41a — will next be transmuted by the federal courts into a binding and unchangeable law. The effects of the decisions in these cases are, as we discuss below, already being felt in other cases.

II. The Court of Appeals' Decisions Are Irreconcilable With Numerous Decisions of Pennsylvania's Highest Court.

In our petition, we pointed out that the Court of Appeals' decisions — particularly its holding that the Board's internal policies constitute binding rules — are incompatible with an entire body of case law from Pennsylvania's highest court, concerning administrative agencies in general and the Board in particular. *See* Pet. 24-25. Respondents have not even attempted to argue otherwise.

Instead, respondents address only the conflict between the decisions below and the decision of the Pennsylvania Supreme Court in *Winklespecht v. Pa. Bd. of Probation and Parole*, 571 Pa. 685, 813 A.2d 688 (2002). Br. in Opp. 6-8. Respondents suggest that this conflict is either illusory ("[t]here is no conflict warranting review") or tolerable, because the Pennsylvania Supreme Court may, in some later case, change its mind and follow the lead of the Court of Appeals. Br. in Opp. 8. Even these limited arguments have little substance. The Court of Appeals itself made no attempt to distinguish *Winklespecht*, which it simply brushed aside. *See* Pet. App. 15a-16a, 54a-55a. As for the suggestion that this conflict may eventually resolve itself without the Court's

intervention, we submit that the courts of Pennsylvania will not likely defer to the federal Court of Appeals on an issue which is so thoroughly entwined with well-settled issues of state law; and in any event, the Commonwealth's parole system cannot be left indefinitely in limbo merely on the off-chance that they might.

The conflict between the Pennsylvania and federal courts — including, but emphatically not limited to, the conflict with *Winklespecht* — must be resolved now, for the harm inflicted by the Court of Appeals is already beginning to spread.

III. The Holding in *Mickens-Thomas* Has Been Broadly Applied by Both the Court of Appeals and District Courts, and Threatens Pennsylvania's Parole System with Widespread Instability.

Next, respondents suggest that the holding in *Mickens-Thomas* will apply only to prisoners who, like Mickens-Thomas, became eligible for parole upon commutation of a life sentence. Br. in Opp. 9-10. *Mickens-Thomas*, they say, is a "fact bound analysis," "not suitable for a grant of certiorari," which will have only limited effect because of its "unique and dispositive circumstances." Br. in Opp. 9. That was indeed the petitioners' hope when *Mickens-Thomas* came down; but that hope quickly proved unfounded.

The argument respondents now make is precisely the argument which petitioners made to the Court of Appeals in *Hollawell*, to no avail. Hollawell was not a commuted lifer, and in *Hollawell* the Court of Appeals had virtually no factual record before it, but the court expressly rejected both petitioners' attempt to distinguish *Mickens-Thomas* and their call for further factual development. *See* Pet. App. 15a-16a. Rather, the Court of Appeals

characterized *Mickens-Thomas* as having decided the broad legal question of "whether retroactive application of a parole statute amendment expressing for the first time that 'the board shall first and foremost seek to protect the safety of the public' violates the *Ex Post Facto Clause*." Pet. App. 14a. *See also* Pet. App. 16a (*Mickens-Thomas* held "as a legal matter that the Pennsylvania statutory change violates the Ex Post Facto Clause.") Respondents make no attempt to reconcile their narrow reading of *Mickens-Thomas* with either the reasoning or the result in *Hollawell*.

District courts in Pennsylvania have been quick to take the hint; all of the district courts which have ruled on the issue have applied *Mickens-Thomas* broadly to invalidate denials of parole. So far, four different district court judges have issued writs of habeas corpus relying on *Mickens-Thomas*.[5] None of the prisoners involved in these cases was a commuted lifer, and none of the decisions turns on the facts of an individual case. Indeed, one district court thought that the facts were so unlikely to matter "in light of the clear guidance on the issue ... from the Third Circuit," that he issued the writ before the respondents had even been served with the habeas petition. Reply App. 53a, 57a.

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[5]These decisions are reprinted in the appendix to this brief. *See Hart v. Pa. Bd. of Probation and Parole*, No. 01cv1768 (W.D. Pa., Feb. 26, 2003), *appeal pending*, No. 03-1890 (3d Cir.), *reprinted at* Reply App. 12a; *Bowling v. Johnson*, No. 01cv1400 (W.D. Pa., April 16, 2003), *appeal pending*, No. 03-2466 (3d Cir.), *reprinted at* Reply App. 27a; *Benchoff v. Colleran*, No. 03cv0740 (M.D. Pa., June 6, 2003), *motion for reconsideration filed* (June 23, 2003), *reprinted at* Reply App. 46a; *Moore v. Ward*, No. 00cv0090 (M.D. Pa., July 10, 2003), *appeal pending*, No. 03-3202 (3d Cir.), *reprinted at* Reply App. 58a.

There thus appears to be no realistic possibility that *Mickens-Thomas* will be confined to its facts. Rather, Pennsylvania faces the very real prospect that every prisoner who was sentenced before the date of the 1996 amendment, and whose parole is denied, will challenge that denial in habeas; that every future change in Board policies or practices will provoke a similar series of challenges; and that every federal court which receives such a challenge will subject the Board's decision to the same intrusive scrutiny applied in *Mickens-Thomas* —if indeed they do not simply issue the writ without any scrutiny at all. Pennsylvania has turned to the Court to avert this widespread disruption to its parole system.

IV. These Cases Are Not Moot, but If They Were, the Proper Disposition Would Be to Vacate the Judgments Below.

Finally, respondents claim that *Mickens-Thomas* has become moot[6] because the Board has already issued the re-adjudication ordered by the Court of Appeals, and therefore "there is no meaningful relief which this Court can award." Br. in Opp. 10. Both the premise and the conclusion of this argument are incorrect.

It is certainly true that where a party has "fully and irrevocably" complied with the terms of an order, the correctness of that order on appeal becomes a moot question. *University of Texas v. Camenisch*, 451 U.S. 390, 398 (1981). The Board believes, and the District Court has held, that the Board fully complied with the Court of

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[6]Respondents do not claim that *Hollawell* is moot, and it clearly is not, since the Board has not yet held the re-hearing ordered by the Court of Appeals. *See Calderon v. Moore*, 518 U.S. 149 (1996) (per curiam) (case not moot where re-trial ordered by habeas court had not yet been held).

Appeals' judgment when it issued its decision on re-hearing, even though the Board once again denied Mickens-Thomas' parole application. This case therefore would indeed be moot, but for the fact that in the courts below Mickens-Thomas continues to maintain that the Board has *not* fully complied with the judgment.

Mickens-Thomas claims that he is entitled, not just to a re-hearing, but to a favorable decision from the Board; he has asked the Court of Appeals, and then the District Court, and now again the Court of Appeals, to order his immediate release on parole. If Mickens-Thomas is correct, then the Board will not have "fully" complied with the Court of Appeals' judgment until it releases him; and even then, its action would not be "irrevocable," since he could be taken back into custody if the Court should overturn the underlying judgment of the Court of Appeals. This case, then, remains very much alive.

Even if *Mickens-Thomas* were moot, it would not follow that the Court should deny the petition. Where a case becomes moot while a petition for certiorari is pending,

> the established practice of the Court ... is to reverse or vacate the judgment below and remand with a direction to dismiss. ... That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance.

United States v. Munsingwear, 340 U.S. 36, 39-40 (1950). *See* C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure*, § 3533.10, p. 434 & n. 31 (1984 & 2003 Supp.) (collecting cases). That was the course followed in *Honig v. Doe*, 471 U.S. 148 (1985) (per curiam), where the case was mooted by the petitioner's compliance with an injunction. If these cases should become moot, the Court should do likewise here.

Respectfully submitted,

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September 9, 2003

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LOUIS MICKENS-THOMAS, Petitioner	:	CIVIL ACTION
	:	NO. 99-5161
v.	:	
DONALD VAUGHN, et al., Defendants.	:	

MEMORANDUM

BUCKWALTER, J. August 22, 2003

Before the court is Petitioner's motion to enforce habeas corpus judgment. The following paragraphs from that motion sets forth the background.

Louis Mickens-Thomas filed a petition for a writ of habeas corpus after being refused parole by the Pennsylvania Board of Probation and Parole a second time in 1998. This court granted the writ on March 15, 2002, finding an ex post facto violation. The Parole Board appealed.

On February 21, 2003, the Third Circuit Court issued a judgment and opinion affirming this court's grant of the writ of habeas corpus to Mr. Thomas.

The judgment and opinion of the Third Circuit provided conditional relief. The Board was given the opportunity to correct the constitutional violation by holding a new hearing on remand within 45 days, and reaching a fair decision in accordance with the specific directives of the appellate court.

If the Guidelines recommend release the Board should

fairly consider the weight of this recommendation. A decision contrary to a Guidelines recommendation must be buttressed by unique factors which outweigh the Guidelines endorsement. Moreover, release on parole is a Board policy presumption, and parole should be granted unless countervailing negative factors affirmatively outweigh reasons supporting release.

The Parole Board's petition for reargument en banc was denied on March 24, 2003. On April 7, 2003, the Board's motion to stay or recall the mandate was denied, and on April 10, 2003, the Third Circuit certified its judgment in lieu of a formal mandate.

On May 22, 2003, the Parole Board issued a decision which refused parole to Mr. Thomas for a fourth time.

On June 4, 2003, Mr. Thomas filed a motion in the Third Circuit requesting immediate release from custody, and a motion to enforce habeas corpus judgment. On June 18, 2003, in an order attached as Exhibit "D", the Third Circuit denied the motions without prejudice to present them to this court. "It is for the District Court to determine whether the action by the Board of Probation and Parole is consistent with the opinion of this court."

In support of his motion, petitioner argues that:

1. The Board's fourth parole refusal is in violation of the Third Circuit's opinion and order. See Memorandum of Law in Support of Motion.

2. The Board has manipulated the 1990 Guidelines to recommend a parole refusal. When these same Guidelines were applied to Mr. Thomas in 1997 and 1998, they recommended release. See, e.g., Mickens-Thomas, 321 F.3d at 387, 390. The added factor points of

prior record substance abuse, resulting in a refusal recommendation, are not required by or justified under the Guidelines and have been added as a post-litigation strategy to deny parole.

3. If the Guidelines were properly and fairly computed, the recommendation would be release on parole. The Board has failed to fairly justify a decision contrary to these Guidelines "buttressed by unique factors which outweigh the Guidelines endorsement." Mickens-Thomas, 321 F.3d at 393.

4. The Board has asserted that Mr. Thomas has not meaningfully participated or benefitted from sex therapy programs. Exhibit "C", 3,5. This "reason" for parole denial is pretextual as it was not stated by the Board for the parole refusals of 1997 and 1998. Mr. Thomas has participated in every available program. A new statute, 42 Pa. C.S. § 9718.1, barring parole for a "denier" who cannot complete the current sex therapy program is being unconstitutionally applied to Mr. Thomas.

5. The Board relies on impermissible factors, such as arrests and unsubstantiated charges from over 40 years ago. It also places heavy weight on Mr. Thomas' steadfast assertion of innocence, a fact known to the Pardons Board and Governor when commutation was granted and which was not a barrier under pre-1996 law.

6. The Board's conclusion that Mr. Thomas, who is now 75 years old, is an "unrehabilitated ... dangerous sexual offender who ... is likely to offend if released" (Exhibit "C", 5) is completely refuted by the Board's own guidelines and explanatory notes, which conclude that Mr. Thomas is an extremely low risk to offend. It is rebutted as well by the consistent psychiatric and institutional evaluation evidence that there is no contraindiction to parole.

7. If the Board has fairly considered the overwhelming evidence favoring release under pre-1996 standards, Mr. Thomas would have been paroled just as every other inmate who has had his life sentence commuted since 1941 has been paroled. "The Thomas application is distinguished from these 266 cases only by the intervening policy directive of 1996, emphasizing public safety." Mickens-Thomas, 321 F.3d at 385.

8. The Board has violated the terms of the Third Circuit Court's opinion and conditional habeas order, and petitioner's ex post facto and substantive due process rights.

9. The Board has violated the First Amendment and the Due Process Clause by vindictively denying parole in retaliation for petitioner's successful federal habeas corpus action.

As to his first argument, for reasons which will be set forth hereafter, petitioner is correct the Board's fourth parole refusal violates the Third Circuit's opinion. Secondly, the argument that the Board manipulated the guidelines is based upon the fact that it added a factor of prior record substance abuse. This added factor resulted in a guideline recommendation of parole refusal. Thus, as stated in his third argument, if the guidelines had been properly and fairly computed, the recommendation would be for parole and the Board would have to justify its decision "by unique factors which outweigh" that recommendation.

But as stated with regard to the first argument, the Board's fourth refusal violated the Third Circuit's opinion. Whether the board failed to read the opinion, interpreted it incorrectly or just flat out ignored it cannot be ascertained from the record before me. But that it ruled

contrary to the opinion in adding the factor of prior substance abuse is not reasonably debatable.

Here is what the Third Circuit said in its opinion:

> In 1997 and 1998 the Guidelines protocol resulted in a conclusion that Thomas should be released, but he was not. In 2000, the protocol recommended against parole. The date entered into the chart for past substance abuse changed, and thus he was then classified as a habitual offender with history of past abuse. The record shows some alcohol abuse by Thomas, but no drug use. Moreover, this reclassification on the Guidelines worksheet increased his overall objective score and placed him in the range of cases where the Guidelines recommended against parole. There is no evidence that alcohol abuse should, suddenly, as of the 2000 report, be given such significance: The Guidelines recommendation in 2000 is not worthy of consideration because it appears to have been deliberately designed to achieve a non-parole decision.
>
> The Guidelines did not show him to be a recidivism risk. The Board did not consider seriously psychological contraindications or any other non-Guidelines factor that might have militated against parole.

Following is what the Board says in its notice of board decision (fourth refusal):

> NOTE: THE 1990 GUIDELINES MANDATE THAT SUCH INSTANCES OF ALCOHOL ABUSE BE ADDED INTO THE GUIDELINE SCORE AND DO NOT ALLOW EXCEPTIONS BASED UPON THE LENGTH OF INCARCERATION OR UPON PARTICIPATION IN INSTITUTIONAL ALCOHOL ABUSE PROGRAMS.

EVIDENCE IN THE FILE CLEARLY DEMONSTRATES YOUR HISTORY OF ALCOHOL ABUSE; AND, AT YOUR RECENT INTERVIEW, YOU ADMITTED ABUSING ALCOHOL. THE OMISSION OF THIS FACTOR IN ANY PREVIOUSLY-COMPLETED 1990 GUIDELINE FORM WAS THEREFORE ERRONEOUS.

In my view, in saying "there is no evidence that alcohol abuse should, suddenly, as of the 2000 report be given such significance" applies equally to the Board decision now before the court.

Without the two points added for alcohol abuse, this court's review is to determine if the Board's decision contrary to the guideline recommendation is "buttressed by unique factors which outweigh the guidelines endorsement."

Those other factors are listed in Part V of the Board's decision as follows:

V. OTHER FACTORS (NOT COUNTED IN 1990 GUIDELINE SCORE) WHICH INDICATE THAT PAROLE SHOULD BE REFUSED:

(1) YOU HAVE A HISTORY OF MULTIPLE PRIOR ASSAULT ARRESTS, INCLUDING THE FOLLOWING:

A. IN 1945 YOU WERE ARRESTED FOR RAPE [JUVENILE].
B. IN 1959 YOU WERE CHARGED WITH CHOKING A PREGNANT WOMAN WITH A SCARF, UNTIL SHE PASSED OUT.
C. IN 1959 YOU WERE ALSO ACCUSED OF ATTACKING A 14-YEAR-OLD BABYSITTER, WITH YOUR PANTS REMOVED AND SHE FIGHTING TO GET FREE.
D. IN 1961 YOU WERE ACCUSED OF ASSAULT WITH

A BLACKJACK.

[2] STATEMENTS FROM YOUR FORMER WIFE INDICATE THAT WHEN YOU DRANK YOU ALWAYS WANTED TO ENGAGE IN SODOMY AND WOULD BEAT AND CHOCK HERE IF SHE REFUSED TO COMPLY.

[3] YOUR ANGER AND RESENTMENT TOWARD WOMEN WAS EVIDENT IN YOUR RECENT INTERVIEW.

[4] YOU HAVE CONSISTENTLY REFUSED TO ACCEPT RESPONSIBILITY FOR YOUR CRIMES AND HAVE SHOWN NO REMORSE. THE BOARD BELIEVES THAT ACCEPTANCE OF GUILT IS THE FIRST AND MOST NECESSARY STEP TOWARD REHABILITATION. SEE MCKUNE V. LILE, 536 U.S. 24, 122 S.CT. 2017, 2032 (2002). YOU HAVE NOT TAKEN THIS FIRST STEP. NOR DOES THE BOARD BELIEVE THAT YOU ARE IN ANY SENSE JUSTIFIED IN DENYING GUILT, SINCE YOU WERE CONVICTED BY A JURY OF YOUR PEERS AND YOUR CONVICTION WAS UPHELD BY THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA. THAT COURT UNANIMOUSLY RULED THAT YOU RECEIVED A FAIR TRIAL AND THAT THE EVIDENCE "OVER-WHELMINGLY"[SIC] SUPPORTED YOUR GUILT. COMMONWEALTH V. THOMAS, 448 PA. 42, 292 A.2D 352, 356 (1972). FURTHER, THE FILE REFLECTS THAT YOU FAILED A POLYGRAPH TEST ADMINISTERED BY THE PHILADELPHIA POLICE DEPARTMENT AS TO YOUR DENIAL OF GUILT IN THE RAPE AND MURDER OF 12-YEAR-OLD EDITH CONNOR.

[5] YOUR REFUSAL TO ACCEPT RESPONSIBILITY FOR YOUR CRIMES HAS PREVENTED YOU FROM COMPLETING THE SEXUAL OFFENDER THERAPY

SO ESSENTIAL IN YOUR CASE. [ALTHOUGH THE SAME FACTOR ALSO HELPS TO EXPLAIN WHY THE BOARD COULD NOT DEPART FROM THE GUIDELINE RECOMMENDATION TO DENY PAROLE, THIS FACTOR WAS NOT ACTUALLY COUNTED IN THE GUIDELINE SCORE WHICH RESULTED IN THAT RECOMMENDATION AND IS, THEREFORE, IN ITS OWN RIGHT, AN ADDITIONAL CIRCUMSTANCE COUNSELING AGAINST THE GRANT OF PAROLE.] THIS THERAPEUTIC REGIMEN REQUIRES THAT YOU COMPLETE THREE PHASES OF TREATMENT. TO PROGRESS FROM THE FIRST TO THE SECOND PHASE REQUIRES THAT YOU ADMIT GUILT. YOUR REFUSAL TO DO SO HAS PREVENTED YOUR ADVANCEMENT BEYOND THE FIRST PHASE AND, AS A CONSEQUENCE, HAS LEFT YOU AN UNREHABILITATED AND UNREPENTANT DANGEROUS SEXUAL OFFENDER WHO, IN THE BOARD'S OPINION, IS LIKELY TO REOFFEND IF RELEASED.

[6] THE DISTRICT ATTORNEY'S OFFICE OF THE CITY OF PHILADELPHIA HAS OBJECTED TO YOUR RELEASE ON PAROLE FOR THE FOLLOWING REASONS, WHICH THE BOARD FINDS PERSUASIVE:

A. YOU STRANGLED A 12 YEAR OLD LITTLE GIRL;
B. YOU RAPED AND ANALLY SODOMIZED THAT LITTLE GIRL;
C. YOU ARE A VIOLENT SEXUAL OFFENDER, ESPECIALLY WHEN DRINKING;
D. YOU HAVE NEVER ACCEPTED RESPONSIBILITY FOR YOUR ACTIONS;
E. YOU HAVE NOT COMPLETED SEXUAL-OFFENDER THERAPY;
F. YOU ARE STILL IN DENIAL;
G. SEXUAL OFFENDERS, LIKE YOURSELF, ARE NOTORIOUSLY RECIDIVIST OFFENDERS.

[7] DESPITE YOUR AGE, YOUR PHYSICAL CONDITION IS GOOD AND WOULD NOT DETER YOUR CRIMINAL ACTIVITIES, IF YOU ARE RELEASED.

In deciding whether these factors are unique and outweigh the guidelines favoring parole, the Third Circuit Court's opinion is particularly helpful in determining pre-1996 parole procedures; that is, before the 1996 statutory mandate which the court found violated the ex post facto clause. In doing so, it is worth noting that court's assessment of the Board's function in past parole hearings involving petitioner. It said

> Although the Board has not given due consideration to the relevant factors, this can be explained by its misguided reliance on the post-1996 criteria. Moreover, we are exceedingly reluctant to usurp the Board's functions and, except in our review capacity, substitute our own judgment for that of the parole Board. Although there were flaws and oversights in the Board's consideration of Thomas's applications we are not entirely convinced that the Board is unable to give Thomas a fair hearing in light of the important consideration we have set forth in this opinion.

Pre-1996 parole criteria as stated in footnote 8, p. 379 of the Third Circuit opinion included:

> These factors include the presence of psychotic or dangerous behavioral characteristics manifested during the parole interview; recent psychiatric reports causing concern; a pattern of habitual offense of assaultive crimes; or an unfavorable recommendation from the Department of Corrections staff.

The whole idea in pre-1996 parole hearings is expressed at page 386 of the Third Circuit opinion as

follows:

> We conclude, then, that prior to 1996, the Board's concern for potential risks to public safety could not be the sole or dominant basis for parole denial under the existing Guidelines. Considerations of public safety were already incorporated into its Guidelines analysis; the Board had to point to "unique" factors as a basis for its rejection of the Guidelines. Moreover, the Board had to weigh all factors, militating for and against parole, and make its decision on the totality of the factors pertinent to parole, and give appropriate weight to the interests of the inmate. Heavy foot application on one facto could not have been the basis of granting or rejecting parole.

The Board's latest parole decision reflects that it did "weigh all factors, militating for and against parole," and contrary to petitioner's argument, does not contravene the Third Circuit opinion. As specifically alluded to in that opinion, the Board's previous failure to give due consideration to relevant factors "can be explained by its misguided reliance on the post-1996 criteria."

The Board's decision (Exhibit "C" of petitioner's motion) speaks for itself and it will not be repeated here in detail except to say that as the Third Circuit opinion instructed, a court must be exceedingly reluctant to substitute its own judgment for that of the Board's.

Here, the Board did give petitioner a fair hearing in light of the important considerations set forth in the Third Circuit opinion. It was based on many factors, not one of which was dispositive as in prior decisions.

An order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LOUIS MICKENS-THOMAS, Petitioner	:	CIVIL ACTION
	:	NO. 99-6161
v.	:	
	:	
DONALD VAUGHN, et al., Defendants.	:	

ORDER

AND NOW, THIS 22nd day of August, 2003, it is hereby ORDERED that petitioner's motion to enforce habeas corpus judgment requesting that a conditional order for habeas corpus relief be made absolute is DENIED.

BY THE COURT:

/s/
RONALD L. BUCKWALTER, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALEXANDER V. HART, AY-88912, Petitioner,	:	
vs.	:	Civil Action No.
PENNSYLVANIA BOARD OF PROBATION AND PAROLE, PHILLIP JOHNSON and MIKE FISHER, Respondents.	:	01-1768

AMBROSE, Chief District Judge

OPINION AND ORDER OF COURT

SYNOPSIS

Pending before the Court is a Petition for Writ of Habeas Corpus (Docket No. 4). After careful consideration of the submissions of the parties, and based on my Opinion as set forth below, I am granting Petitioner's Writ of Habeas Corpus to the extent that I am remanding the case to the Pennsylvania Board of Probation and Parole.

OPINION

Petitioner, Alexander Hart, has filed a Petition for Habeas Corpus relief pursuant to 28 U.S.C. § 2254, wherein he complains that the Pennsylvania Board of Probation and Parole ("Board") improperly refused his applications for release on parole for unconstitutional reasons. In his Petition, Petitioner avers that in August 2, 1983, he pled guilty to aggravated assault, robbery, burglary and criminal conspiracy, and the court

sentenced him to a term of imprisonment to ten (10) to twenty (20) years, followed by five (5) years of probation.[1]

After the expiration of his minimum sentence on May 25, 1995[2], Petitioner was eligible for parole under Pennsylvania law.[3] The Board denied Petitioner's parole application on October 13, 1995, November 20, 1996, June 6, 1997, July 23, 1999, and November 7, 2000. By notice dated October 13, 1995, the Board denied Petitioner's request citing the following reasons: poor prison adjustment; substance abuse; habitual offender; assaultive instant offense; victim injury; weapons involved in the commission of offense: firearm and knife; unfavorable recommendation from the Department of Corrections; threat to community. At that time, the Board required Petitioner to participate in a prescriptive plan, maintain a clear conduct record, and earn an institutional recommendation for parole. By notice dated November 20, 1996, Petitioner was again denied parole. This time the Board simply reaffirmed its prior action. By notice dated June 6, 1997, the Board again denied Petitioner's request for parole citing the following reasons: poor prison adjustment; substance abuse; habitual offender; assaultive instant offense; victim injury; weapons involved in the commission of offense: firearm

---

[1]In December, 1970, Petitioner pled guilty as an accomplice to a charge of second degree murder for which he was given a sentence of ten to twenty years. On April 14, 1979, the Board granted him parole. It was while he was on parole that he was convicted of the instant offenses.

[2]Due to his prior conviction, the Board recommitted Petitioner in August 1983, to complete his original sentence. Therefore, Petitioner did not begin serving this sentence until May 25, 1985.

[3]See 61 Pa. Stat. § 331.21.

and knife; unfavorable recommendation from the Department of Corrections and District Attorney. Again, the Board required the Petitioner to participate in a prescriptive plan, maintain a clear conduct record, and earn an institutional recommendation for parole. The Board indicated that his application for parole was to be reviewed in May, 1999, or earlier, if recommended by the appropriate institutional staff because of demonstrable benefit from participation in an appropriate treatment program for Community Connections Center ("CCC") placement for nine months.

On July 23, 1999, the Board again denied Petitioner's request for parole indicating as follows:

> Following an interview and review of your file, the Pennsylvania Board of Probation and Parole has determined that the mandates to protect the safety of the public and to assist in the fair administration of justice cannot be achieved through your release on parole. You are therefore reused parole and ordered to: Be reviewed in or after May, 2001.
>
> At your next interview, the Board will review your file and consider: Whether you have received a favorable recommendation for parole from the Department of Corrections. Whether you have maintained a clear conduct record and completed the Department of Corrections' Prescriptive Programs(s).
>
> Your history of violent crime and parole failure indicate that you are not suitable for release at the present time.

By notice dated November 7, 2000, the Board again denied Petitioner's application for parole filed August 24, 2000 by simply reaffirming the Board action denying parole on July 23, 1999.

On December 12, 2000, Petitioner filed a Petition for Writ of Mandamus in the Commonwealth Court of Pennsylvania. On December 13, 2000, the Commonwealth Court dismissed the Petition holding that the Board's discretionary decision as to whether to grant parole was not subject to judicial review under Pennsylvania law. On March 12, 2001, the Supreme Court of Pennsylvania affirmed the Commonwealth Court's Order of December 13, 2000.

Petitioner filed his federal Petition for Habeas Corpus relief on September 21, 2001. As the bases for his request for habeas corpus relief, Petitioner asserts the following.

1. Sections 101 and 702 of Title 2 of the Pennsylvania Consolidated Statutes violate the Privileges and Immunities clause of Article IV and the First and Fourteenth Amendments to the United States Constitution.

2. Sections 101 and 702 of title 2 of the Pennsylvania Consolidated Statutes violate the Equal Protection Clause of the United States Constitution.

3. The laws, regulations, and/or rules in Pennsylvania governing the parole determining process fail to provide safeguards and/or guidelines in its laws governing parole to prevent arbitrary or capricious denials of parole, or, alternatively, the Pennsylvania legislature failed to provide such safeguards and/or guidelines.

4. The Parole Board violated Petitioner's due process rights under the Fourteenth Amendment when it rendered its November 7, 2000 decision because it failed to state sufficient reasons for its denial as required by law, abused the discretion granted to it under 61 P.S. § 331.22, failed in its duty to consider

Petitioner's application for parole as mandated by 61 P.S. § 331.22 and/or failed in its duty to consider the factors, mandated by 61 P.S. § 331.19.

5. The application of the 1996 parole laws and guidelines to Petitioner violates the ex post facto clause of the United States Constitution.

Before a state prisoner is entitled to seek federal habeas corpus relief under 28 U.S.C. § 2254, his claims must have been presented to the state courts through any available state court procedures. *See* 28 U.S.C. § 2254(b). This "exhaustion" requirement serves to protect the interest of comity, which ensures that the state courts have the first opportunity to address and correct violations of state prisoners' federal rights. Rose v. Lundy, 455 U.S. 509, 518 (1982); Preiser v. Rodriguez, 411 U.S. 475, 491 (1973). Accordingly, before a federal court addresses the merits of a state prisoner's claims, constitutional and federal law issues first must have been fairly presented to the state court through direct appeal, collateral review, state *habeas* proceedings, *mandamus* proceedings, or other available procedures for judicial review. *See, e.g.,* Castille v. Peoples, 489 U.S. 346, 351 (1989); Picard v. Connor, 404 U.S. 270, 275 (1971); Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996); Burkett v. Love, 89 F.3d 135, 137 (3d Cir. 1996). The petitioner has the burden of establishing that exhaustion has been met. Ross v. Petsock, 868 F.2d 639, 643 (3d Cir. 1989); O'Halloran v. Ryan, 835 F.2d 506, 508 (3d Cir. 1987). Exhaustion is not a jurisdictional limitation, however, and federal courts may review the merits of a state petitioner's claims prior to exhaustion when no appropriate state remedy exists. Christy v. Horn, 115 F.3d 201, 206, (1997); Doctor, 96 F.3d at 681; Carter v. Vaughn, 62 F.3d 591, 594 (3d Cir. 1995).

Under current Pennsylvania law, Board decisions

denying parole applications are not subject to appellate review. *See* Rogers v. Commonwealth, Bd. of Probation and Parole, 555 Pa. 285, 724 A.2d 319 (1999); Weaver v. Pennsylvania Bd. of Probation and Parole, 688 A.2d 766 (Pa. Commw. Ct. 1997). Notwithstanding, an action in mandamus in the original jurisdiction of the Commonwealth Court of Pennsylvania may be available for a prisoner to pursue constitutional issues associated with the denial of parole. *See* Coady v. Vaughn, 770 A.2d 287 (Pa. 2001); Coady v Vaughn, 251 F.3d 480, 489 (3d Cir. 2001).

In this action, Petitioner attempted to exhaust his claims by presenting them in a mandamus action that he filed in the original jurisdiction of the Commonwealth Court of Pennsylvania. The Commonwealth Court did not review Petitioner's constitutional claims but dismissed his petition as improperly seeking parole release through a mandamus action. Through his Petition for Allowance of Appeal, which ultimately was denied, Petitioner presented his claims to the Supreme Court of Pennsylvania. Thus, it appears that Petitioner has attempted to comply with the exhaustion requirement notwithstanding the Pennsylvania court's failure to have reviewed the merits of his claims.

In Appel v. Horn, 250 F.3d 203, 210 (3d Cir. 2001), the United States Court of Appeals for the Third Circuit held that where the state court fails to adjudicate or address the merits of a petitioner's claims, the federal habeas court must conduct a *de novo* review over pure legal questions and mixed questions of law and fact. Petitioner's claims will be reviewed in accordance with this standard.

A state prisoner may be granted federal habeas corpus relief only if he is in custody in violation of the Constitution or federal law. 28 U..C. § 2254(a) Smith v.

Phillips, 455 U.S. 209 (1982); Geschwendt v. Ryan, 967 F.2d 877 (3d Cir.), *cert. denied*, 506 U.S. 977 (1992); Zettlemoyer v. Fulcomer, 923 F.2d 284 (3d Cir.), *cert. denied*, 502 U.S. 902 (1991). Violations of state law or procedural rules alone are not sufficient; a petitioner must allege a deprivation of federal rights before federal habeas relief may be granted. Engle v. Isaac, 456 U.S. 107 (1982); Wells v. Petsock, 941 F.2d 253 (3d Cir. 1991), *cert. denied*, 505 U.S. 1223 (1992).

Petitioner asserts that the Board violated his constitutional rights by refusing his parole applications based on arbitrary political considerations instead of those considerations set forth in the Parole Act of 61 Pa. Stat. § 331.21(a). In this regard, petitioner points to the 1995 controversy surrounding the Board's release of several criminals who were charged with committing serious violent offenses.[4] One of these criminals, Robert "Mudman" Simon, shot and killed a New Jersey Police Officer during a routine traffic stop three months after his release. These events precipitated an intense investigation of Pennsylvania's parole system by the Senate Judiciary Committee of the Pennsylvania General Assembly, who reported the results of the investigation to the Governor. *See* Stewart v. Pennsylvania Board of Probation and Parole, 714 A.2d 502, 504, n.1 (citing Chairman's Report: Investigation into the Parole of Robert Simon, Senate of Pennsylvania Judiciary Committee, 179th Gen. Assembly 1995 Sess. 1-6 (February 1996)). As a result of this investigation, the Judiciary Committee made recommendations that the emphasis of Pennsylvania's parole philosophy should be changed from prisoner rehabilitation to the protection of public safety,

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[4]Fisher, Changing Pennsylvania's Sentencing Philosophy Through the Elimination of Parole for Violent Offenders, 5 Widener J. Pub. L. 269, 284-289 (1996).

deterrence of crime and incapacitation of criminals. Id.

In 1995 and again in 1996, the Parole Act was amended to implement the suggested changes in parole policy for violent offenders. Section 1 of the Parole Act, 61 P.S. § 331.1, which enunciates the state's public policy concerning parole, was amended to provide that "the board shall first and foremost seek to protect the safety of the public." *See* Stewart, 714 A.2d at 508. Also, section 34 of the Parole Act was amended by adding a new section that prohibits the Board from acting upon a parole application for a violent offender unless the inmate has served at least one year in a prerelease center. *See* Myers v. Ridge, 712 A.2d 791, 795-96 (Pa. Commw. 1998), *appeal denied*, 742 A.2d 173, 560 Pa. 677 (1999). Also in section 34.1, the legislature added a definition for the term "crime of violence" to include murder of the third degree, voluntary manslaughter, rape, sexual assault, involuntary deviate sexual intercourse, robbery, arson, aggravated assault or kidnapping, including a conviction for attempt to commit the above-listed crimes. Id.

In addition, several internal changes were implemented with respect to the Board's procedures for approving parole applications for criminals convicted of violent offenses. One change concerned the number of votes needed to approve a recommendation to grant parole. Specifically, the revised parole guidelines imposed a requirement for three signatures instead of two before a violent offender may be approved for release on parole. In addition, the Board was directed to certify that the rights of victims as set forth in section 21.1 (now codified as 61 Pa. Stat. § 331.22a) of the Parole Act were fully complied with whenever the Board approved the parole application for the release of a violent offender. *See*

Myers, 712 A.2d at 798.[5]

Petitioner asserts that the Board violated his constitutional rights by denying his application for parole based on political considerations. Respondents correctly note that petitioner does not have any liberty interest in being released from custody prior to the expiration of his maximum sentence that arises under the United States Constitution, the Pennsylvania Constitution or Pennsylvania law. Accordingly, Petitioner cannot have any procedural due process rights in the processing of his application for parole.

Notwithstanding, several courts, including the Court of Appeals of the Third Circuit, recognize that even though an inmate has no liberty interest in parole that implicates procedural due process, substantive due process may be violated if parole is denied by arbitrary government action. In this regard, courts have determined that decisions to grant or deny parole may violate a prisoner's right to substantive due process if such decisions are based on arbitrary and capricious factors. The Supreme Court has declined to set forth a precise rule that defines the scope of impermissible "arbitrary" conduct for purposes of applying the substantive component of the Due Process Clause. Nonetheless, the Supreme Court has clarified that governmental conduct does not violate a persons'

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[5]Section 22.1, which was added to the Parole Act in 1986, requires the district attorney to notify the victim of the offense (or an immediate family member) of his or her ability to present a statement for the parole Board's consideration or to testify at the parole hearing concerning the release of the defendant. When the defendant is being considered for parole, the Board is required to notify the victim or relative to allow them the ability to raise any objections to the defendant's release. *See* 61 Pa. Stat. § 331.22a.

substantive due process rights unless it amounts to an abuse of official power that "shocks the conscience." County of Sacramento v. Lewis, 523 U.S. 833, 118 S.Ct. 1708, 1718-19 (1998).

Thus, in reviewing the Board's exercise of discretion in denying an application for parole, this court's only role "is to insure that the Board followed criteria appropriate, rational and consistent with the statute and that its decision is not arbitrary and capricious nor based on impermissible considerations." Block, 631 F.2d at 236. In its decisions, the Board identified many legitimate reasons for exercising its discretion in denying petitioner's applications for early release from prison, and therefore, it cannot be said that such action was arbitrary or capricious. However, the Petitioner asserts that the changes in the Board's criteria for approving parole applications for violent offenders in Pennsylvania has resulted in a violation of the Ex Post Facto Clause of the United States Constitution as these criteria have been applied to his parole applications.

The Ex Post Facto Clause of the United States Constitution provides that "[n]o state shall...pass any...ex post facto law." U.S. Const. Art. 1, § 10. The Supreme Court has instructed that "[t]o fall within the ex post facto prohibition, a law must be retrospective---that is it must apply to events occurring before its enactment---and it must disadvantage the offender affected by it by altering the definition of criminal conduct or increasing the punishment for the crime." Lynce v. Mathis, 117 S. Ct. 891, 896 (1997)(citation and quotation omitted). In analyzing whether a law violates the ex post facto clause, the courts are required to determine whether the law resulted in "a sufficient risk of increasing the measure of punishment attached to the covered crimes." California Dep't of Corrections v. Morales, 514 U.S. 499, 509 (1995).

Specifically, Petitioner raises the issue of whether the modification in the parole laws by the Pennsylvania legislature in 1996 and changes in the parole decision making policies of the Board as applied to Petitioner was a violation of the ex post facto clause. Recently, the Court of Appeals for the Third Circuit addressed this precise issue in Mickens-Thomas v. Vaughn, No. 02-2047 & 02-2213 (3rd Cir. Feb. 21, 2003). In Mickens-Thomas, the court found that although risks to public safety in granting parole have always been a consideration in the decisional process, "after 1996, the Board applied to the public safety interest far greater weight." Mickens-Thomas v. Vaughn, No. 02-2047 & 02-2213, slip op. at 16-17. The court noted as follows:

> The evidence here demonstrates that since 1996, the Board has given special weight to the risk to public safety. Pre-1996, a prisoner could be denied parole because of the public safety concerns only if those concerns together with other relevant factors outweighed, by a preponderance, the liberty interests of the inmate. The 1996 policy change placed first and foremost the public safety to the disadvantage of the remaining liberty interest of the prisoner.

Mickens-Thomas, No. 02-2047 & 02-2213, slip op. at 17. The Court explained that statistical evidence which it deemed to be "quite staggering" supported the conclusion that after 1996 there was a significant change in policy. Id. at 18. The court also pointed to "substantive declarations" of Board policy showing that after 1996 a new standard was applied:

> A 1996 report by the Legislative Judiciary Committee strongly exhorted the Board to reform its parole policies by placing greater stress on public safety. A 1997 self-assessment by the Board specifically noted that during the 1995-1997 period, public safety

became the Board's new "foremost concern." The new Guidelines, implemented between 1998 and 2000, placed more weight on "victim injury." The 2000 Board Decision denying [Petitioner's] parole noted that its action was consistent with the Board's "mandate" to protect the public. This language did not appear on earlier Board decisions and reflects its new parole policy. These declarations stand in bold contrast to the pre-1996 policies, which commanded that the Board give weight to various factors in the parole process, such as Department of Corrections staff recom-mendations, educational accomplishments, job training, and therapy programs. This factor-based approach strongly suggests that dispositive weight should not be given to any one factor. Pre-1996, release upon eligibility for parole was presumed, and any decision to deny parole based on public safety considerations had to be supported by specific reasons, which outweighed those factors favoring release. Prior to 1996, a Board recommendation contrary to the Guidelines required that the Board have "appropriate reasons for [its parole denial] decision." Because the pre-1996 Guidelines already factored in the risk to pubic safety vis-a-vis relevant recidivism indicators, the Board after 1996 could not give added, and certainly not exclusive, weight to public safety in overruling the Guidelines.

Id. at 19. Accordingly, the court concluded that prior to 1996, the Board's concern for public safety could not be the "sole or dominant basis" for parole denial while post-1996, considerations of public safety became the "dominant concern" of the Board. Id. at 19-20.

In the instant case, as in Mickens-Thomas, the Board decision denying Petitioner's parole indicated that its action was consistent with "the mandates to protect the safety of the public." In addition, rather than weighing

specific factors, the Board simply indicated that Petitioner's "history of violent crime and parole failure indicates" that he is "not suitable for release at the present time." The notice of the Board simply reiterates that he must receive a favorable recommendation of parole from the Department of Corrections, maintain a clean conduct record and complete the prescriptive program. These are the same requirements as first required of him in 1995. The evidence of record does not contradict Petitioner's assertion that he fulfilled these requirements. Yet, the focus of the Board's action seems to be the underlying offenses rather than the efforts made by Petitioner to address the requirements of the Board.

Therefore, it is clear that the concern for public safety was given greater weight in the Board's determinations. Accordingly, as in Mickens-Thomas, the Board's actions in retroactively applying changes in the parole laws to Petitioner violated the ex post facto clause of the United States Constitution.

Although the Petitioner requests release, I cannot usurp the Board's functions and substitute my judgment for that of the Board. Mickens-Thomas, slip op at 31.[6] Accordingly, I will remand to the Board for a new hearing. Under the guidance provided by the Court of Appeals for the Third Circuit, "[i]f the Guidelines recommend release the Board should fairly consider the weight of this recommendation. A decision contrary to a Guidelines recommendation must be buttressed by unique factors which outweigh the Guidelines endorsement. Moreover, release on parole is a Board policy presumption, and parole should be granted unless countervailing negative factors affirmatively outweigh reasons supporting release." Id at 31.

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[6]In the instant case, there is no evidence that the Board intentionally evaded a court mandate or acted in bad faith.

DATE FILED:	FEBRUARY 26, 2003
PETITIONER'S COUNSEL:	Christine H. Nooning Esq. PO Box 100087 Pittsburgh PA 15233
RESPONDENTS' COUNSEL:	Att Gen Office Attn Francis R Filipi Esq. Strawberry Sq 15th Fl Harrisburg PA 15233

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALEXANDER V. HART, AY-88912, Petitioner,	:	
vs.	:	Civil Action No.
PENNSYLVANIA BOARD OF PROBATION AND PAROLE, PHILLIP JOHNSON and MIKE FISHER, Respondents.	:	01-1768

ORDER OF COURT

THEREFORE, this **26th** day of February, 2003, it is ORDERED that Petitioner's Writ of Habeas Corpus be GRANTED to the extent that the case is REMANDED for a further hearing before the Pennsylvania Board of Probation and Parole to be held within forty-five (45) days under the standards that existed prior to the enactment of the amendments to the Probation and Parole Act codified at 61 P.S. 331.1.

BY THE COURT:

/s/
Donetta W. Ambrose,
Chief U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DAVID BOWLING,	:	
Petitioner	:	
	:	
v.	:	Civil Action No. 01-1400
	:	Judge McVerry
MR. JOHNSON, PA.	:	Magistrate Judge Caiazza
BD. OF PROBATION	:	
AND PAROLE,	:	
Respondents	:	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

RECOMMENDATION

Pending before the Court is a Petition for Writ of Habeas Corpus (Docket No. 1). After careful consideration of the submissions of the parties, and based on my Report as set out below, I recommend that the Petitioner's Writ of Habeas Corpus be granted to the limited extent that the case be remanded to the Pennsylvania Board of Probation and Parole.

REPORT

Petitioner, David Bowling (Bowling), has filed a Petition for Habeas Corpus relief pursuant to 28 U.S.C. § 2254, wherein he complains that the Pennsylvania Board of Probation and Parole ("Board") improperly refused his applications for release on parole for unconstitutional reasons. In his Petition, Bowling claims that on September 14, 1992, he pled guilty to aggravated assault and, thereafter, was sentenced to a term of imprisonment of five (5) to fifteen (15) years. Petitioner's sentence was to have a minimum expiration date of February 11, 1997

and a maximum expiration date of February 11, 2007.[1]

After the expiration of his minimum sentence on February 11, 1997, Petitioner was eligible for parole under Pennsylvania law.[2] The Board denied Petitioners's parole application on January 2, 1997, February 4, 1998, January 25, 1999, January 25, 2000 and June 8, 2001. On January 2, 1997, the Board denied Petitioner's request citing the following reasons: substance abuse; habitual offender; assaultive instant offense; very high assaultive behavior potential, victim injury; weapon involved in the commission of offense; and need for treatment. At that time, the Board required Petitioner to participate in a prescriptive plan including AA and advanced alcohol abuse programming, maintain a clear conduct record, and earn an institutional recommendation for parole. On February 4, 1998, the Board again denied Petitioner's request citing the following reasons: substance abuse; habitual offender; assaultive instant offense; very high assaultive behavior potential, victim injury; weapon involved in the commission of offense-tire iron; unfavorable recommendation from the Department of Corrections; very serious assaultive offense with history of serious assaultive offense. At that time, the Board required Petitioner to participate in all prescriptive program plans, maintain a clear conduct record, and earn an institutional recommendation for parole. The Board indicated that eligibility for parole could be reviewed again in or after November, 1998, with a Community Connections Center evaluation for parole placement.

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[1]Petitioner was sentenced on December 9, 1992. At sentencing, Petitioner received credit for 300 days of imprisonment, from February 11, 1992 until December 9, 1992.

[2]*See* 61 Pa. Stat. §331.21

On January 25, 1999, the Board again denied Petitioner's request for parole indicating as follows:

> Following an interview and review of your file, the Pennsylvania Board of Probation and Parole has determined that the mandates to protect the safety of the public and to assist in the fair administration of justice cannot be achieved through your release on parole. You are therefore refused parole and ordered to:
>
> Be reviewed in or after January, 2000.
>
> At your next interview, the Board will review your file and consider:
>
> Whether you have successfully completed a treatment program for: sex offenders and substance abuse.
>
> Whether you have received a favorable recommendation for parole from the: Department of Corrections.
>
> Whether you have maintained a clear conduct record and complete the Department of Corrections' Prescriptive Program(s).

On January 25, 2000, the Board again denied Petitioner's application for parole with the following decision:

> Following an interview and review of your file, the Pennsylvania Board of Probation and Parole has determined that the mandates to protect the safety of the public and to assist in the fair administration of justice cannot be achieved through your release on parole. You are therefore refused parole and ordered to:

Be reviewed in or after January, 2002.

At your next interview, the Board will review your file and consider:

Whether you have successfully completed a treatment program for: sex offenders.

Whether you have received a favorable recommendation for parole from the: Department of Corrections.

Whether you have maintained a clear conduct record and completed the Department of Corrections' Prescriptive Program (s).

Your minimization of your crime and lack of insight after years of sex offender program causes concern.

On June 8, 2001, the Board once again denied Petitioner's request for parole with the following explanation:

Following a review of your file, the Pennsylvania Board of Probation and Parole has determined that the fair administration of justice cannot be achieved through your release on parole. You are therefore refused parole and ordered to:

Be reviewed in or after June, 2003

At your next interview, the Board will review your file and consider:

Whether you have successfully completed a treatment program for: sex offenders, substance abuse, and prescribed programs.

Whether you have received a favorable recommendation for parole from the Department of Corrections.

Whether you have maintained a clear conduct record and complete the Department of Corrections' Prescriptive Program (s).

On December 20, 1999, the Commonwealth Court of Pennsylvania dismissed a Petition for Review filed by Petitioner, holding that the Board's discretionary decision as to whether to grant parole was not subject to judicial review under Pennsylvania law. On July 9, 2001, the Supreme Court of Pennsylvania denied a Petition for Allowance of Appeal filed by Petitioner.

Petitioner filed his federal Petition for Habeas Corpus relief on July 26, 2001. As the basis for his request for habeas corpus relief, Petitioner asserts, *inter alia*, that the application of the 1996 parole laws and guidelines to Petitioner violates the ex post facto clause of the United States Constitution.[3]

Before a state prisoner is entitled to seek federal habeas corpus relief under 28 U.S.C. § 2254, his claims must have been presented to the state courts through any available state court procedures. *See* 28 U.S.C. § 2254 (b). This "exhaustion" requirement serves to protect the interest of comity, which ensures that the state courts have the first opportunity to address and correct violations of state prisoners' federal rights. Rose v. Lundy, 455 U.S. 509, 518 (1982); Preiser v. Rodriguez, 411 U.S.

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[3]Petitioner asserts a number of legal theories and factual allegations in support of the argument that he is entitled to habeas corpus relief based on the continued denial of his applications for parole. Given my findings herein, I need not address each of Petitioner's legal arguments in this regard.

475, 491 (1973). Accordingly, before a federal court addresses the merits of a state prisoner's claims, constitutional and federal law issues first must have been fairly presented to the state courts through direct appeal, collateral review, state *habeas* proceedings, *mandamus* proceedings, or other available procedures for judicial review. *See, e.g.*, Castille v. Peoples, 489 U.S. 346, 351 (1989); Picard v. Connor, 404 U.S. 270, 275 (1971); Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996); Burkett v. Love, 89 F.3d 135, 137 (3d Cir. 1996). The petitioner has the burden of establishing that exhaustion has been met. Ross v. Petsock, 868 F.2d 639, 643 (3d. Cir. 1989); O'Halloran v. Ryan, 835 F2d 506, 508 (3d. Cir. 1987). Exhaustion is not a jurisdictional limitation, however, and federal courts may review the merits of a state petitioner's claims prior to exhaustion when no appropriate state remedy exists. Christy v. Horn, 115 F.3d 201, 206 (1997); Doctor, 96 F.3d at 681; Carter v. Vaughn, 62 F.3d 591, 594 (3d Cir. 1995).[4]

Under current Pennsylvania law, Board decisions denying parole applications are not subject to appellate judicial review. *See* Rogers v. Commonwealth, Bd. of Probation and Parole, 555 Pa. 285, 724 A.2d 319 (1999); Weaver v. Pennsylvania Bd. of Probation and Parole, 688 A.2d 766 (Pa. Commw. Ct. 1997). Notwithstanding, an action in mandamus in the original jurisdiction of the Commonwealth Court of Pennsylvania may be available for a prisoner to pursue constitutional issues associated with the denial of parole. *See* Coady v. Vaughn, 770 A.2d 287 (Pa. 2001); Coady v. Vaughn, 251 F. 3d 480, 489 (3d Cir. 2001).

In this action, Petitioner attempted to exhaust his

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[4]The respondent does not dispute that exhaustion has been met.

claims by presenting them in a mandamus action that he filed in the original jurisdiction of the Commonwealth Court of Pennsylvania.[5] The Commonwealth Court did not review Petitioner's constitutional claims but dismissed his Petition as improperly seeing parole release through a mandamus action. Through his Petition for Allowance of Appeal, which ultimately was denied, Petitioner presented his claims to the Supreme Court of Pennsylvania. Thus, it appears that Petitioner has attempted to comply with the exhaustion requirement notwithstanding the Pennsylvania courts' failure to have reviewed the merits of his claims.

In Appel v. Horn, 250 F.3d 203, 210 (3d Cir. 2001), the United States Court of Appeals for the Third Circuit held that where the state court fails to adjudicate or address the merits of a petitioner's claims, the federal habeas court must conduct a *de novo* review over pure legal questions and mixed questions of law and fact. Petitioner's claims will be reviewed in accordance with this standard.

A state prisoner may be granted federal habeas corpus relief only if he is in custody in violation of the Constitution or federal law. 28 U.S.C. § 2254 (a). Smith v. Phillips, 455 U.S. 209 (1982); Geschwendt v. Ryan, 967 F.2d 877 (3d Cir.), *cert. denied*, 506 U.S. 977 (1992); Zettlemoyer v. Fulcomer, 923 F.2d 284 (3d Cir.), *cert. denied*, 502 U.S. 902 (1991). Violations of state law or procedural rules alone are not sufficient; a petitioner must allege a deprivation of federal rights before federal

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[5]Petitioner has not included with his Petition a copy of his Petition for Review as filed with the Commonwealth Court of Pennsylvania. However, the Commonwealth Court's Order dated December 20, 1999 indicates that it was acting upon a Petition for Review whereby Petitioner sought "by way of mandamus to be paroled."

habeas relief may be granted. Engle v. Isaac, 456 U.S. 107 (1982); Wells v. Petsock, 941 F.2d 253 (3d Cir. 1991), *cert denied*, 505 U.S. 1223 (1992).

Essentially, Petitioner asserts that the Board violated his constitutional rights by refusing his parole applications based on arbitrary political considerations instead of those considerations set forth in the Parole Act at 61 Pa. Stat. § 331.21 (a). In this regard, Petitioner points to the alleged changes in Board policy as a consequence of a 1995 controversy surrounding the Board's release of several criminals who were charged with committing serious violent offenses.[6] One of these criminals, Robert "Mudman" Simon, shot and killed a New Jersey Police Officer during a routine traffic stop three months after his release. These events precipitated an intense investigation of Pennsylvania's parole system by the Senate Judiciary Committee of the Pennsylvania General Assembly, who reported the results of the investigation to the Governor. *See* Stewart v. Pennsylvania Board of Probation and Parole, 714 A.2d 502, 504, n.1 (citing Chairman's Report: Investigation in to the Parole of Robert Simon, Senate of Pennsylvania Judiciary Committee, 179th Gen. Assembly 1995 Sess. 1-6 (February 1996)). As a result of this investigation, the Judiciary Committee made recommendations that the emphasis of Pennsylvania's parole philosophy should be changed from prisoner rehabilitation to the protection of public safety, deterrence of crime and incapacitation of criminals. Id.

In 1995 and again in 1996, the Parole Act was amended to implement the suggested changes in parole

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[6]Fisher, Changing Pennsylvania's Sentencing Philosophy Through the Elimination of Parole for Violent Offenders, 5 Widener J. Pub. L. 269, 284-289 (1996).

policy for violent offenders. Section 1 of the Parole Act, 61 P.S. § 331.1, which enunciates the state's public policy concerning parole, was amended to provide that "the board shall first and foremost seek to protect the safety of the public." *See* Stewart, 714 A.2d at 508. Also, section 34 of the Parole Act was amended by adding a new section that prohibits the Board from acting upon a parole application for a violent offender unless the inmate has served at least one year in a prerelease center. *See* Myers v. Ridge, 712 A.2d 791, 795-96 (Pa. Commw. 1998), *appeal denied*, 742 A.2d 173, 560 Pa. 677 (1999). Also in section 34.1, the legislature added a definition for the term "crime of violence" to include murder of the third degree, voluntary manslaughter, rape, sexual assault, involuntary deviate sexual intercourse, robbery, arson, aggravated assault or kidnapping, including a conviction for attempt to commit the above-listed crimes. Id.

In addition, several internal changes were implemented with respect to the Board's procedures for approving parole applications for criminals convicted of violent offenses. One change concerned the number of votes needed to approve a recommendation to grant parole. Specifically, the revised parole guidelines imposed a requirement for three signatures instead of two before a violent offender may be approved for release on parole. In addition, the Board was directed to certify that the rights of victims as set forth in section 21.1 (now codified as 61 Pa. Stat. § 331.22a) of the Parole Act were fully complied with whenever the Board approved the parole application for the release of a violent offender. *See* Myers, 712 A.2d at 798.[7]

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[7]Section 22.1, which was added to the Parole Act in 1986, requires the district attorney to notify the victim of the offense (or an immediate family member) of his or her ability to present a statement for the parole Board's consideration or to testify at (continued...)

Respondents correctly note that Petitioner does not have any liberty interest in being released from custody prior to the expiration of his maximum sentence that arises under the United States Constitution, the Pennsylvania Constitution or Pennsylvania law.[8] Accordingly, Petitioner cannot have any procedural due process rights in the processing of his application for parole.

Notwithstanding, several courts, including the Court of Appeals for the Third Circuit, recognize that even though an inmate has no liberty interest in parole that implicates procedural due process, substantive due process may be violated if parole is denied by arbitrary

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[7](...continued)
the parole hearing concerning the release of the defendant. When the defendant is being considered for parole, the Board is required to notify the victim or relative to allow them the ability to raise any objections to the defendant's release. *See* 61 Pa. Stat. § 331.22a.

[8]*See, e.g.*, McFadden v. Lehman, 968 F. Supp. 1001, 1004 (M.D. Pa. 1997) (Pennsylvania has not created enforceable liberty interest in parole, rehabilitative pre-release programs, or in therapy programs); Rodgers v. Parole Agent SCI-Frackville, Wech, 916 F. Supp. 474, 476 (E.D. Pa. 1996); McCrery v. Mark, 823 F. Supp. 288 (E.D. Pa. 1993); Mickens-Thomas v. Commonwealth, Bd. of Probation and Parole, 699 A.2d 792 (1997) (parole is nothing more than a possibility; it merely constitutes favor granted by the state as a matter of grace and mercy); Tubbs v. Pennsylvania Bd. of Probation and Parole, 620 A.2d 584, 586 (Pa. Commw. Ct. 1993) ("it is well settled under Pennsylvania law that a prisoner has no constitutionally protected liberty interest in being released from confinement prior to the expiration of his sentenced maximum term ... the [Board] makes each decision on a case by case basis, and prisoners have no guarantees that parole will ever be granted"), *appeal denied*, 637 A.2d 295 (Pa. 1993).

government action. In this regard, courts have determined that decisions to grant or deny parole may violate a prisoner's right to substantive due process if such decisions are based on arbitrary and capricious factors. The Supreme Court has declined to set forth a precise rule that defines the scope of impermissible "arbitrary" conduct for purposes of applying the substantive component of the Due Process Clause. Nonetheless, the Supreme Court has clarified that governmental conduct does not violate a person's substantive due process rights unless it amounts to an abuse of official power that "shocks the conscience." County of Sacramento v. Lewis, 523 U.S. 833, 118 S.Ct. 1708, 1718-19 (1998).

Thus, in reviewing the Board's exercise of discretion in denying an application for parole, this court's only role "is to insure that the Board followed criteria appropriate, rational and consistent with the statute and that its decision is not arbitrary and capricious nor based on impermissible considerations." Block, 631 F.2d at 236. In its decisions, the Board identified many legitimate reasons for exercising its discretion in denying petitioner's applications for early release from prison, and, therefore, it cannot be said that such action was arbitrary or capricious. However, the Petitioner asserts that the changes in the Board's criteria for approving parole applications for violent offenders in Pennsylvania has resulted in a violation of the Ex Post Facto Clause of the United States Constitution as these criteria have been applied to his parole applications.

The Ex Post Facto Clause of the United States Constitution provides that "[n]o state shall ... pass any... ex post facto law." U.S. Const. Art. 1, § 10. The Supreme Court has instructed that "[t]o fall within the ex post facto prohibition, a law must be retrospective --- that is it must apply to events occurring before its enactment ---and it

must disadvantage the offender affected by it by altering the definition of criminal conduct or increasing the punishment for the crime." Lynce v. Mathis, 117 S. Ct. 891, 896 (1997) (citation and quotation omitted). In analyzing whether a law violates the ex post facto clause, the courts are required to determine whether the law resulted in "a sufficient risk of increasing the measure of punishment attached to the covered crimes." California Dep't of Corrections v. Morales, 514 U.S. 499, 509 (1995).

Specifically, the instant Petition raises the issue of whether the modification in the parole laws by the Pennsylvania legislature in 1996 and changes in the parole decision making policies of the Board as applied to Petitioner was a violation of the ex post facto clause. Recently, the Court of Appeals for the Third Circuit addressed this precise issue in Mickens-Thomas v. Vaughn, No. 02-2047 & 02-2213 (3d Cir. Feb. 21, 2003). In Mickens-Thomas, the court found that although risks to public safety in granting parole have always been a consideration in the decisional process, "after 1996, the Board applied to the public safety interest far greater weight." Mickens-Thomas, No. 02-2047 & 02-2213, slip op. at 16-17. The court notes as follows:

> The evidence here demonstrates that since 1996, the Board has given special weight to the risk to public safety. Pre-1996, a prisoner could be denied parole because of the public safety concerns only if those concerns together with other relevant factors outweighed, by a preponderance, the liberty interests of the inmate. The 1996 policy change placed first and foremost the public safety to the disadvantage of the remaining liberty interest of the prisoner.

Mickens-Thomas, No. 02-2047 & 02-2213, slip op. at 17. The court explained that statistical evidence which it deemed to be "quite staggering" supported the conclusion

that after 1996 there was a significant change in policy. Id. at 18. The court also pointed to "substantive declarations" of Board policy showing that after 1996 a new standard was applied:

> A 1996 report by the Legislative Judiciary Committee strongly exhorted the Board to reform its parole policies by placing greater stress on public safety. A 1997 self-assessment by the Board specifically noted that during the 1995-1997 period, public safety became the Board's new "foremost concern." The new Guidelines, implemented between 1998 and 2000, placed more weight on "Victim Injury." The 2000 Board Decision denying [Petitioner's] parole noted that its action was consistent with the Board's "mandate" to protect the public. This language did not appear on earlier Board decisions and reflects its new parole policy. These declarations stand in bold contrast to the pre-1996 policies, which commanded that the Board give weight to various factors in the parole process, such as Department of Corrections staff recommendations, educational accomplishments, job training, and therapy programs. This factor-based approach strongly suggests that dispositive weight should not be given to any one factor.
>
> Pre-1996, release upon eligibility for parole was presumed, and any decision to deny parole based on public safety considerations had to be supported by specific reasons, which outweighed those factors favoring release. Prior to 1996, a Board recommendation contrary to the Guidelines required that the Board have "appropriate reasons for [its parole denial] decision." Because the pre-1996 Guidelines already factored in the risk to public safety vis-a-vis relevant recidivism indicators, the Board after 1996 could not give added, and certainly not exclusive, weight to public safety in overruling the

Guidelines.

Id. at 19. Accordingly, the court concluded that prior to 1996, the Board's concern for public safety could not be the "sole or dominant basis" for parole denial while post-1996 considerations of public safety became the "dominant concern" of the Board. Id. at 19-20.

In the instant case, as in Mickens-Thomas, the Board decision denying Petitioner's parole indicated that its action was consistent with "the mandates to protect the safety of the public." In addition, rather than weighing specific factors, the Board simply refused Petitioner's application in February, 1999, January, 2000, and June, 2001 without explanation of how it weighed various factors to reach its decision. Indeed, of these decisions, only in January, 2000, did the Board give any insight into the reasoning behind its decision in its statement that, "Your minimization of your crime and lack of insight after years of sex offender programs causes concern." However, any statement demonstrating this concern was notably absent in previous reviews and in a subsequent review in June, 2001. Otherwise, the notices of the Board simply reiterate that he must receive a favorable recommendation of parole from the Department of Corrections, maintain a clean conduct record and complete the prescriptive program. These are the same requirements as first required of him in 1997. The evidence of record does not contradict Petitioner's assertion that he fulfilled these requirements. Yet, the focus of the Board's action seems to be the underlying offenses rather than the efforts made by Petitioner to address the requirements of the Board.[9]

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[9]This is not to say that the Board may not consider the effectiveness of these programs on the rehabilitation of the Petitioner as it did in January, 2000.

Therefore, it is clear that the concern for public safety was given greater weight in the Board's determinations. Accordingly, as in Mickens-Thomas, the Board's actions in retroactively applying changes in the parole laws to Petitioner violated the ex post facto clause of the United States Constitution.

Although the Petitioner requests release, this court cannot, and should not, usurp the Board's functions and substitute its judgment for that of the Board. Mickens-Thomas, slip op. at 31.[10] Accordingly, I will recommend that this case be remanded to the Board for a new hearing. Under the guidance provided by the Court of Appeals for the Third Circuit, "[i]f the Guidelines recommend release, the Board should fairly consider the weight of this recommendation. A decision contrary to a Guidelines recommendation must be buttressed by unique factors which outweigh the Guidelines endorsement. Moreover, release on parole is a Board policy presumption, and parole should be granted unless countervailing negative factors affirmatively outweigh reasons supporting release." Id. at 31.

CONCLUSION

THEREFORE, this 10th day of March, 2003 it is recommended that Petitioner's Writ for Habeas Corpus be GRANTED to the extent that the case be REMANDED for a further hearing before the Pennsylvania Board of Probation and Parole to be held within forty-five (45) days under the standards that existed prior to the enactment of the amendments to the Probation and Parole Act codified at 61 P.S. 331.1.

In accordance with the Magistrate's Act, 28 U.S.C. §

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[10]In the instant case, there is no evidence that the Board intentionally evaded a court mandate or acted in bad faith.

636 (b) (1) (B) and (C), and Rule 72.1.4 (B) of the Local Rules for Magistrates, objections to this Report and Recommendation are due by March 26, 2003. Responses and Objections are due by April 7, 2003.

March 10, 2003

/s/
Francis X. Caiazza
Chief U.S. Magistrate Judge

cc:
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DAVID BOWLING, Petitioner	: CIVIL ACTION NO. 01-1400
v.	: Judge McVerry
MR. JOHNSON, PA. BD. OF PROBATION AND PAROLE, Respondents	: Magistrate Judge Caiazza

MEMORANDUM AND ORDER

David Bowling's Petition for Writ of Habeas Corpus was received by the Clerk of Court on July 27, 2001, and was referred to the United States Magistrate Judge Francis X. Caiazza for Report and Recommendation in accordance with the Magistrates Act, 28 U.S.C. § 636 (b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

The Magistrate Judge's Report and Recommendation, filed on March 10, 2003, recommended that the Writ of Habeas Corpus filed by David Bowling be granted and that the case be remanded for a further hearing before the Pennsylvania Board of Probation and Parole to be held within forty five days under the standards that existed prior to the enactment of the amendments to the Probation and Parole Act codified at 61 Pa. Cons. Stat. § 331.1. The parties were allowed ten (10) days from the date of service to file objections. Service was made on the Petitioner by First Class United States Mail delivered to the State Correctional Institution at Pittsburgh, Pittsburgh, Pennsylvania, where he is incarcerated and on Respondents.

Objections were filed by the Respondents on March 26, 2003. (Doc. 12) The Petitioner's Response was filed on April 10, 2003. (Doc. 13). In their objections the Respondents seek a stay of this action stating that on March 7, 2003, the Pennsylvania Board of Probation and Parole filed a petition for rehearing before the United States Court of Appeals for the Third Circuit. *See* Resp't's Objections, (Doc. 12) at ¶ 2. However, a review of the General Docket Ledger of the Court of Appeals shows that Appellant's petition for an *en banc* rehearing was denied by order dated March 24, 2003. However, the Ledger shows that on March 31, 2003, the Appellants filed a motion to stay the mandate pending the filing of a Petition for Writ of *Certiorari* in the United States Supreme Court.

After de novo review of the pleadings and documents in the case, together with the Report and Recommendation, objections and Response, the following order is entered:

AND NOW, this 16th day of April, 2003;

IT IS HEREBY ORDERED that Respondents' Motion to Stay Action is GRANTED. The Report of Magistrate Judge Caiazza, dated March 10, 2003, is adopted as the opinion of the court, with the exception of that part of the Recommendation which mandates the Pennsylvania Board of Probation and Parole to schedule a hearing within forty-five days.

/s/
Terrence F. McVerry
United States District Court Judge

cc:
Francis X. Caiazza
Chief U.S. Magistrate judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ROBERT BENCHOFF, Petitioner	: CIVIL ACTION NO. 3:CV-03-0740
v.	: (JUDGE CAPUTO)
RAYMOND COLLERAN, et al., Respondents	: (Magistrate Judge Blewitt)

REPORT AND RECOMMENDATION

On May 2, 2003, while incarcerated at the State Correctional Institution at Waymart, Waymart, Pennsylvania, ("SCI-Waymart") the Petitioner filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Petitioner is incarcerated as a result of August 15, 1995, convictions in the Franklin County Court of Common Pleas. **(Doc. 1)**. Petitioner also filed an application for leave to proceed *in forma pauperis*. We give the Petition preliminary consideration[1] and conclude that, based on two recent Third Circuit cases, the Petition should be granted to the extent that the Court should enter an Order directing the Pennsylvania Board of Probation and Parole (the Board) to re-adjudicate Petitioner's parole application applying the pre-1996 Pennsylvania Parole Act and rules.

I. State Procedural History

On August 15, 1995, following a jury trial, Petitioner was found guilty of burglary, simple assault, and criminal

[1]See Rule 4, Rules Governing Section 2254 Cases in the United States District Courts.

trespass (Case No. 150-1995). Petitioner plead guilty to two counts of interference with the custody of children (Case No 872-1994).[2] On December 13, 1995, Petitioner received a six to thirty-four (6 to 34) year aggregate sentence of imprisonment. After his sentencing, on December 22, 1995, Petitioner filed an appeal with the trial court. On April 24, 1996, the trial court denied Petitioner's post-sentence motions. On May 1, 1996, Petitioner appealed his sentence and conviction to the Pennsylvania Superior Court. The Pennsylvania Superior Court affirmed Petitioner's judgment of sentence in case number 872-1994 (interference with child custody convictions), but vacated the judgment of sentence in case number 150-1995 (burglary, assault, and trespass convictions). *Commonwealth v. Benchoff*, 700 A.2d 1289 (Pa. Super. 1997).

After re-sentencing by a new Common Pleas Judge, Petitioner then directly appealed both of his judgments of sentence to the Pennsylvania Superior Court (Case # 535 H'burg 1998), 788 A.2d 128 (Pa. Super. May 16, 2001)(Table), and to the Pennsylvania Supreme Court (Case # 386 MAL 2001), *Commonwealth v. Benchoff*, 567 Pa. 735, 788 A.2d 372 (Table)(October 24, 2001). Both courts affirmed his judgments on May 16, 2001, and October 24, 2001, respectively. (Doc. 1, p. 3, ¶ 9.). Petitioner does not state if he filed a Petition for Writ of Certiorari with the United States Supreme Court. Petitioner's judgments of sentence became final thirty (30) days after the Pennsylvania Supreme Court affirmed his judgments of sentence in his case on October 24, 2001, *i.e.*, November 23, 2001. (Id.) See Pa. R.A.P. 1113(a), 42

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[2]Portions of Petitioner's procedure history detailed here have been derived from his Habeas Corpus Petition, Doc. 1 of M.D. Pa. Civil Action No. 3:CV-02-1885, as well as from his 1997 appeal to the Pennsyvlania Superior Court, *Commonwealth v. Benchoff*, 700 A.2d 1289 (Pa. Super. 1997).

Pa. C.S.A. Thereafter, Petitioner states that he filed a federal petition for writ of habeas corpus with this Court, challenging his 1995 convictions, which was docketed at 3:CV-02-0934. (*Id. at* ¶ 11.). Petitioner avers that he then filed a second petition for habeas relief with this Court, challenging the decision of the Board as unconstitutional since the Board did not give him reasons for the denial of parole, which petition was docketed to 3:CV-02-1885. (*Id.*)[3]

Petitioner indicates in his present Habeas Corpus Petition that he did not file a petition under the Post Conviction Relief Act ("PCRA") with the trial court pursuant to 42 Pa. C.S.A. § 9541, *et seq.* (Doc. 1, p.7).

Approximately seven (7) months after his second Habeas Corpus Petition was filed, Petitioner filed the instant Petition for Writ of Habeas Corpus.

Petitioner primarily contends that he is entitled to habeas relief due to the Board's application of amended parole standards which were not in effect at the time he was sentenced and which resulted in the Board's denial of his parole, in violation of the constitutional protection against *ex post facto* laws. In essence, Petitioner claims

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[3]Petitioner's 02-0934 Petition was filed on May 31, 2002, and his 02-1885 Petition was filed on October 15, 2002. Petitioner's 02-0934 Petition was timely filed within one year of the date his judgments became final (November 23, 2001, and May 31, 2002). *See* 28 U.S.C. § 2244(d)(1). *See also Kapral v. United States*, 166 F.3d 565, 570 (3d Cir. 1999)(if a defendant does not file a certiorari petition, a judgment does not become final until the time for seeking certiorari review expires). This Court has not yet ruled on these Petitions. The undersigned is presently preparing a Report and Recommendation regarding Petitioner's habeas corpus petition docketed to Civil Action 02-1885.

that his denial of parole violated the constitution, since the 1996 parole standards were applied retroactively to his 1995 sentences. (*Id., p. 5).* Petitioner's exhibits attached to his Petition seem to indicate that he filed the present claim in a petition for review against the Board with the Pennsylvania Commonwealth Court and then with the Pennsylvania Supreme Court, and that the Commonwealth Court dismissed the petition on November 20, 2002, and the Supreme Court affirmed this decision on April 21, 2003. ___ A.2d __, 2003 WL 1905651). *See* Exhibits A & B attached to Doc. 1.

II. Discussion.

Basically, Petitioner is claiming that he was improperly denied parole by the Board because it applied standards in his case which post-dated his convictions. Petitioner challenges the Board's denial of his parole based on the 1996 amendment to the Pennsylvania Parole Act, which was not in effect at the time of his 1995 convictions. While Respondents have not yet been served with and have not yet responded to the instant Petition, the Exhibits attached to Respondent Colleran's Response to Petitioner's 02-1885 Habeas Corpus Petition show that the Pennsyvlania Parole Board did, in fact, rely upon the amended provision of the Pennsylvania Parol Act in denying Petitioners's last application for parole on October 28, 2002. (*See* Doc. 7, Attachment 5, Civil Action No. 02-1885). Pursuant to the amended provision, Pa. Parole Act. of 1941, as amended, 61 P.s. § 331.1 *et seq.,* the Board specifically considered the interests of the public as one of its reasons to deny Petitioner parole. (*Id.*).

Our review of the State Parole Board decision is limited to an abuse of discretion inquiry, in that relief is only available if an applicant was arbitrarily denied parole on the basis of impermissible criteria such as race, religion, or political beliefs, or on criteria with no rational

relationship to the purpose of parole. *Block v. Potter*, 631 F.2d., 233, 237 (3d Cir. 1980). Petitioner asserts that he was denied parole based on the impermissible retroactive application of the 1996 amendments to his parol application, in violation of the *ex post facto* clause of the Constitution.

Thus, the Petitioner's *ex post facto* claim is that the Pennsylvania Parole Board's decision to deny him parole was based on constitutionally impermissible reasons — namely, that the Board impermissibly applied to his parole application parole standards amended in 1996, which were not in effect at the time of his sentencing (1995). Petitioner thus claims that the decision rendered by the Pennsylvania Parole Board violate his constitutional right prohibiting *ex post facto* laws.

It is well-settled that "there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1, 7 (1979). Furthermore, it has been held that the Pennsylvania parol statute does not create a liberty interest in the right to be paroled. *Rodgers v. Parole Agent SCI-Frackville, Wech*, 916 F. Supp. 474, 476-77 (E.D. Pa. 1996); *McCrery v. Mark*, 823 F. Sup. 288, 294 (E.D. Pa. 1993). However, the United States Court of Appeals for the Third Circuit has also held that "[E]ven if a state statute does not give rise to a liberty interest in parole release under *Greenholtz*, once a state institutes a parole system all prisoners have a liberty interest flowing directly from the due process clause in not being denied parole for arbitrary or constitutionally impermissible reasons." *Block v. Potter*, 631 F.2d at 236 (Emphasis added). Accordingly, even where a state statute grants discretion to the state parole board to condition or completely deny parole, it may not permit "totally

arbitrary parole decisions founded on impermissible criteria." *Id.* Consequently, a federal court may review a decision by a state parole board for an abuse of discretion. *Id.* Upon such review, relief will only be available if an applicant can show that parole was arbitrarily denied based on some impermissible reason such as "race, religion, or political beliefs," or that the parole board made its determination based on "frivolous criteria with no rational relationship to the purpose of parole...." *Id.* at 236 n.2. Petitioner claims that the Board's decision in his case was based upon the constitutionally impermissible retroactive application of new parole amendments to his case.

As previously noted, it has been repeatedly recognized that Pennsylvania State Law does not confer its inmates with a legally protected interest in parole eligibility. However, in two recent cases similar to Petitioner's, the Third Circuit has held that the Pennsylvania 1996 statutory change to the Parole Act, which expressed "for the first time that 'the board shall first and foremost seek to protect the safety of the public,'" violates the *ex post facto* clause when applied to prisoners convicted prior to the amendment. *Hollawell v. Gillis*, 2003 WL 1919371 (3d Cir. 2003) at p. 5; *Mickens-Thomas v. Vaughn*, 321 F.3d 374 (3d Cir. 2003).[4] The Third Circuit recognized that a parole decision is subject to collateral attack on constitutional grounds such as the *ex post facto* clause. *Id.* This is precisely Petitioner's claim in our case. The Third Circuit applied the test annunciated by the United States Supreme Court in *Cal. Dept. of Corr. v. Morales*, 514 U.S. 499, 509 (1995), in determining that the Pennsylvania 1996 parole law amendment violated the *ex*

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[4]In *Hollawell*, the Third Circuit stated that "*Mickens-Thomas* clearly holds as a legal matter that the Pennsylvania statutory change violates the *Ex Post Facto Clause*." *Hollawell* at p. 6.

post facto clause if it was applied to pre-1996 prisoners. *Id.* Specifically, the *Mickens-Thomas* Court "held that Pennsylvania's change to the parole statute altered the manner in which the Parole board weighed public safety in making parole decisions... ." *Id.* at p. 6. In *Mickens-Thomas,* the Third Circuit held that the 1996 amendments changed the substantive criteria for parol release in Pennsylvania. *Mickens-Thomas,* 321 F.3d at 392.[5] In both *Mickens-Thomas* and *Hollawell,* the Third Circuit directed that the District Court remand the Petitioners' parole applications to the Pennsylvania Parole Board for re-adjudication applying the pre-1996 law.

Furthermore, it is of no moment that the Pennsylvania Courts have held that the denial of our Petitioner's parole was not based on constitutionally impermissible reasons. The Pennsylvania Commonwealth Court stated in its November 20, 2002, Order dismissing Petitioner's petition for review that the amended statement of Policy of the Pennsylvania Parole Act "does not create any substantive rights... ." (Doc. 1, Exhibit B). The Pennsylvania Supreme Court affirmed. (*Id.* at Exhibit A). Moreover, the Pennsylvania Supreme Court in *Winklespecht v. Pa. Bd. of Prob. & Parole* , 813 A.d 688, 692 (Pa. 2002), held that the 1996 amendment did not change Pennsylvania policy as to the criteria for parole, and it did no create a new

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[5]We note that, unlike the Petitioner in *Hollawell,* who did not appeal his Commonwealth Court decision to the Pennsylvania Supreme Court, our Petitioner did. (Doc. 1, Exhibit A). In any event, the Third Circuit still held that *Hollawell* satisfied the exhaustion requirement. *Hollawell* at p. 4. In fact, our Petitioner filed the instant Petition within one (1) month after the Pennsyvlania Supreme Court affirmed the dismissal of his petition for review by the Pennsylvania Commonwealth Court, in which he challenged the Board's decision. (April 21, 2003, to May 2, 2003).

offense or increase the penalty for an existing offense.[6]

Notwithstanding these decisions of the Pennsylvania Courts, which found that the 1996 amendment did not enact a substantive change in Parole Board policy, the Third Circuit noted that *Mickens-Thomas*, is binding precedent on it. *Hollawell* at p. 6. Likewise, this Court is constrained to follow *Mickens-Thomas,* and in doing so we find that this Court should direct the Pennsylvania Parole Board to reconsider Petitioner's parole application and its October 28, 2002, decision under pre-1996 law and rules. Thus, even though the Petition in this case has not yet been served on Respondents, we make the unusual recommendation that the Court grant the Petition to the extent stated in light of clear guidance on the issue presented in this matter from the Third Circuit.[7]

As stated, Petitioner maintains that the Parole Board should not have utilized the 1996 amended parol standards in his case as a basis to deny him parole. Petitioner's challenge of the Parole Board's decision is based on a constitutionally recognized reason, according to *Mickens-Thomas* and *Hollawell.* Therefore, it will be

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[6]Interestingly, the Pennsylvania Commonwealth Court in *Voss v. Pennsylvania Bd. Prob. and Parole,* 788 A.2d 1107, 1111 (Pa. Cmwlth. 2001), stated that under the 1996 amendment, the Board is required "to seek first and foremost to protect the safety of the public." The *Voss* Court further stated that "the public policy as to parole changed in 1996 from client-centered policy emphasizing rehabilitation to one that emphasizes public safety... ." Id.

[7]Since the Petition has not yet been served on Respondents, we shall direct the Clerk of Court to serve them with a copy of the Petition, along with a copy of this Report and Recommendation, and to serve these documents on Respondent Colleran's counsel in case Number 02-1885.

recommended that his Petition be granted to the extent that the Court enter an Order directing the Pennsylvania Parole Board to re-adjudicate Petitioner's parol application and its October 28, 2002, decision, by applying the pre-1996 law and rules.

III. Recommendation.

Based on the forgoing, it is respectfully recommended that the Petition for Writ of Habeas Corpus be granted to the extent that the Court enter an Order directing the Pennsylvania Parole Board to re-adjudicate Petitioner's parole application and its October 28, 2002, decision, by applying the pre-1996 law and rules.

/s/
THOMAS M. BLEWITT
United States Magistrate Judge

Dated: May 16, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ROBERT BENCHOFF, Petitioner	: CIVIL ACTION NO. 3:CV-03-0740
v.	: (JUDGE CAPUTO)
RAYMOND COLLERAN, et al., Respondents	: (Magistrate Judge Blewitt)

NOTICE

NOTICE IS HEREBY GIVEN that the undersigned has entered the foregoing Report and Recommendation dated **May 16, 2003.**

Any party may obtain a review of the Report and Recommendation pursuant to Rule 72.3, which provides:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within ten (10) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or

modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

/s/
THOMAS M. BLEWITT
United States Magistrate Judge

Date: May 16, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ROBERT BENCHOFF, Petitioner	: CIVIL ACTION NO. 3:CV-03-0740
v.	: (JUDGE CAPUTO)
RAYMOND COLLERAN, et al., Respondents	: (Magistrate Judge Blewitt)

ORDER

NOW, this 6th day of June 2003, upon review of Magistrate Judge Thomas M. Blewitt's May 16, 2003 report and recommendation (Doc. 3) for plain error or manifest injustice, **IT IS HEREBY ORDERED** that:

7. The report and recommendation is **ADOPTED.**

8. In light of *Mickens-Thomas v. Vaughn*, 321 F.3d 374 (3d Cir. 2003), Petitioner's petition for writ of habeas corpus is **GRANTED.**

9. The Pennsylvania Parole Board shall re-adjudicate Petitioner's parole application, which was denied on October 28, 2002, under the law and rules that were in effect prior to the 1996 amendments to the Pennsylvania Parole Act.

/s/
A. Richard Caputo
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WILLIAM F. MOORE, Petitioner	:	
vs.	:	CIVIL NO. 3: CV-: 00-0090
WILLIAM F. WARD, et al., Respondents	:	(Judge Conaboy)

MEMORANDUM AND ORDER
Background

William F. Moore, an inmate confined at the Rockview State Correctional Institution (SCI - Rockview), initiated this pro se action by filing a civil rights complaint pursuant to 42 U.S.C. § 1983. By Order dated February 1, 2000, this Court construed the above action as a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, granted Moore temporary leave to proceed in forma pauperis, and dismissed his petition without prejudice for failure to demonstrate exhaustion of his available state court remedies.

On December 20, 2001, the United States Court of Appeals for the Third Circuit issued an Order wherein it agreed that this matter was properly construed as a habeas action and concluded that Petitioner had exhausted his available state court remedies under Coady v. Vaughn, 251 F. 3d 480 (3d Cir. 2001).[1] The Order further directed that Moore's July 20, 2001 response be

[1]It is noted that the decision in Coady was announced over a year after this Court's February 1, 2000 entry of dismissal.

construed as an amendment to his petition and remanded the case for consideration of the Petitioner's Ex Post Facto claim on the merits. Following a lengthy delay, the record was returned to this Court at which time service of the petition and amendment were ordered.

After being granted an enlargement of time, the Respondent submitted a response to the petition on November 4, 2002. Petitioner then sought and was granted an enlargement of time to file a reply. He thereafter filed a timely reply. This matter is now ripe for consideration.

Named as Respondents are William F. Ward, Chairman of the Pennsylvania Board of Probation and Parole (Parole Board) and eight (8) other Board members. It is undisputed that the Petitioner was arrested for a technical parole violation on August 6, 1994. The original petition contended that following a parole violation hearing on September 15, 1994, Moore was informed that he would be reincarcerated for six (6) to nine (9) months as a result of his parole violation. He alleged that said determination was both retaliatory and a violation of due process because it:

> "retroactively rescinding its order of re-parole and exceeding (sic) the presumptive range for back time without giving plaintiff (a technical parole violator) and adequate written justification for doing so and without conducting a hearing."

Doc. 1, ¶ 18.

Moore's July 20, 2001 submission, which has been deemed an amendment to his petition, states that he was tentatively granted reparole subject to approval of his home plan. He notes that the Parole Board's rules and procedures "have been systematically changed." Doc. 24,

p. 5. Furthermore, he "was penalized when he was retroactively placed under new guidelines." Id. at p. 4.

As earlier noted, the Third Circuit has determined that the Petitioner's amendment asserts the Parole Board's recission of reparole and denial of reparole decisions violated the Ex Post Facto Clause.

Discussion

The Respondents initially contend that the claims "raised in the Original Complaint were not properly raised in a petition for a writ of habeas corpus and, therefore, the Original Complaint should be dismissed. See Doc. 32, ¶ 17. As noted above, this Court's February 1, 2000 Order construed Moore's original complaint as a § 2254 habeas petition. By Order dated December 20, 2001, the Third Circuit agreed that "appellant's civil rights complaint was properly construed as a habeas petition pursuant to 28 U.S.C. § 2254." Doc. 21, p. 1.

Based on the prior determinations rendered by both this Court and the Third Circuit, the Respondents' initial argument for dismissal is baseless.

Respondents next contend that dismissal of the petition is warranted because Moore "has not alleged that he exhausted all available state remedies in relation to his ex post facto claim." Doc. 32, ¶ 23. In Coady, the Court of Appeals for the Third Circuit addressed a claim by a state prisoner who alleged that changes in criteria undertaken by the Pennsylvania Board of Probation and Parole violated the Ex Post Facto clause. It held in part that an applicant asserting such a claim had an available state court remedy which must be exhausted prior to seeking habeas relief in federal court. See Coady, 251 F. 3d. at P. 489.

The Third Circuit's December 20, 2001 Order found that Moore "has exhausted his state remedies under Coady." Doc. 21, p. 1. Since this Court is bound by that determination, the Respondents' argument for dismissal based on non-exhaustion of state court remedies is unpersuasive.

In December 1996, the Pennsylvania state legislature amended the law governing parole. Under the modified criteria, protection of the safety of the public is the paramount condition which must be considered in determining parole eligibility. A new law or policy violates the Ex Post Facto clause of the United States Constitution when it is applied to events which occurred prior to its enactment and disadvantages the offender affected by it. Weaver v. Graham, 450 U.S. 24, 29 (1981).

Recently, in Mickens - Thomas v. Vaughn, 321 F. 3d 374 (3d Cir. 2003), the Third Circuit addressed a habeas petition by a Pennsylvania state inmate whose life sentence had been commuted to a term of years with parole eligibility. The applicant claimed entitlement under the Ex Post Facto clause to have the Parole Board determine his parole eligibility based on parole criteria which existed at the time of his conviction and commutation. The Court of Appeals concluded that the 1996 Parole Board policy, even though partly discretionary, was subject to ex post facto analysis because there were "sufficiently discernible criteria to suggest to a reviewing body that the new retroactive policies are being applied against the offender's interest." Id. at p. 386. In conclusion, the matter was remanded to the Parole Board with instructions to fairly consider Mickens-Thomas's parole application in accordance with its decision that "to retroactively apply changes in the parole laws made after conviction" violated the Ex Post Facto clause. Id. at 393.

Respondents' remaining argument is that the new parole criteria did not go into effect until December 18, 1996. Thus, it was not yet in place when the Parole Board rescinded reparole to Moore in December, 1995 and May, 1996. Consequently, Petitioner has failed to meet his burden of showing an Ex Post Facto violation.

It is undisputed that the Pennsylvania legislature did not amend the law governing parole until December, 1996. However, in Mickens - Thomas, the Third Circuit noted that in early 1996 a Pennsylvania Senate committee "strongly recommended" that the Parole Board "place added emphasis on community safety." Id. at 377. The Third Circuit also noted that a mid-1995 assessment by the Pennsylvania Inspector General decided that more emphasis on public safety was needed in making parole decisions. Id. at 380. Additionally, a February, 1996 report by the Chairman of the Pennsylvania Senate Judiciary Committee noted that the Parole Board had recently set out to establish public safety as a priority, including a more careful review of parole eligible cases. Id.

Respondents generally contend only that the new statute was not in place at the time of the denials of Moore's reparole. They have not however, stated whether new parole policies were retroactively applied in the Petitioner's May 1996 review. Based on an application of the facts and reasoning set forth in Mickens - Thomas, it appears that the Parole Board's May, 1996 denial of reparole may have been based on a retroactive application of newly developed parole criteria in violation of the Ex Post Facto clause.

It is the conclusion of this Court that the interests of justice may best be served by remanding this matter to the Parole Board with instructions that it provide Moore with a new reparole hearing in accordance with the

criteria established by the Third Circuit in Mickens - Thomas. An appropriate Order will enter.

AND NOW, THEREFORE, THIS 10th DAY OF JULY, 2003, IT IS HEREBY ORDERED THAT:

1. The petition for writ of habeas corpus is granted.

2. This matter is remanded to the Pennsylvania Board of Probation and Parole. Within thirty (30) days of the date of this Order, the Petitioner will be afforded a new reparole hearing in accordance with the standards announced in Mickens - Thomas v. Vaughn, 321 F. 3d 374 (3d Cir. 2003).

3. The clerk of Court is directed to close the case.

/s/
RICHARD P. CONABOY
United States District Judge